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No. 00-1417

IN THE

Supreme Court of the United States

GARRICK BECK AND JOAN KALB,

Petitioners

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

The First Amendment Prohibits the Enforcement of the Forest Service's Noncommercial Group Use Regulations Against the Expressive and Religious Gatherings Which the Plaintiffs Attend.

In its brief in opposition, the United States devotes most of its attention to conceding the facts as recited by the Petitioners, Br. Opp. at 2-12, and then to responding to the arguments raised by Steven Sedlacko, the Petitioner in No. 00-8512, *Id.* at 12-15, 17-20. When it finally does turn its attention to the challenges advanced by Garrick Beck and Joan Kalb, the Petitioners in No. 00-1417,[1] *Id.* at 15-17,20-21, the government largely mischaracterizes those arguments and almost entirely ignores their important details. The Petitioners in No. 00-1417 now submit the following reply to the arguments which the government has offered in response to their petition for certiorari.

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[1] After Beck and Kalb filed their petition in No. 00-1417, Steven Sedlacko joined in the arguments presented therein.

A. The Challenged Regulations Cannot Stand as Time, Place, and Manner Restrictions Because the Authorization Signature Requirement Is Substantially More Burdensome than Necessary to Achieve Any Legitimate Governmental Objective.

In defending the challenged administrative regulations as valid restrictions on the time, place, and manner of the Petitioners' expression and religious worship, the United States recites its interests in the "(1) [p]rotection of forest resources and facilities; (2) promotion of public health and safety; and (3) allocation of space in the face of greater competition for the use of National Forest System lands." Br. Opp. at 16, *citing* 60 Fed. Reg. 45,262, 45,258. Yet the government never even begins to connect those interests with the particular feature of the permit system challenged here: the requirement that some individual sign the special use authorization itself. 00-1417 Pet. at 22-23. That is, the challenged regulations require that an "agent of the [using] group," 60 Fed. Reg. 45,274, sign the issued permit as opposed to an application for the permit, an operating plan, or other official paperwork. 36 C.F.R. § 251.54(e)(2)(i) [§ 251.54 (g)(3)(ii) (H)].[2] Not only does the government fail to offer any content-neutral interest in support of *this particular* requirement here, *cf.* 00-1417 Pet. at 23, it entirely ignores the reasons why Petitioners assert that the authorization signature requirement burdens "substantially more speech than is necessary to further the government's legitimate interests." 00-1417 Pet. at 23, *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1988).[3]

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[2] See 00-1417 Pet. at 3 n. 3 and Br. Opp. 3-4 n. 1 concerning the non-substantive renumbering of some of the relevant administrative regulations after this case arose.

[3] As the Petitioners have already noted, 00-1417 Pet. at 23, they agree with the government, *cf.* Br. Opp. at 17, that the challenged authoriza-

As the court of appeals below recognized, 00-1417 Pet. App. 10a, there is one interest uniquely served by the authorization signature requirement, but it is just this interest – and the manner in which it is implemented in the challenged regulations – which imposes the serious burden about which the Petitioners complain in this case. The government uses the required signature to bind the group to the terms and conditions which it enumerates on the written authorization. 00-1417 Pet. App. 10a, *citing United States v. Masel*, 54 F. Supp. 2d 903, 919; *see also* 60 Fed. Reg. 45,274, 45,286. The government obviously needs no actual individual or group consent before it can enforce its generally applicable laws and regulations. Therefore the terms and conditions placed on the authorization must necessarily impose *new* group liabilities over and above those already imposed by law. Furthermore, since groups act only through individuals, this new group liability will be vicarious in a very real sense.

But two features of this scheme raise fatal constitutional problems which the government now ignores and which the courts below left altogether unaddressed. First, the content of the enumerated terms and conditions, while no

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tion signature requirement does not fail the narrow tailoring prong of the applicable constitutional test *merely* because it does not reflect the "least intrusive means" of serving the government's interest. But even under the time, place, and manner test, the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1988)(footnote omitted). Neither the United States nor the courts below ever specified why the interests which the government recites here "would be served less effectively" by, for instance, an *application* signature requirement, *cf.* 00-1417 Pet. at 23, and neither ever addressed the Petitioners' argument that the authorization signature requirement imposes a serious and altogether unnecessary chilling effect upon expression and religious worship of the Petitioners and those with whom they would gather.

longer wholly unconstrained by regulation,[4] can nevertheless vary without limitation from case to case.[5] The substantive liability arising from an authorization signature may thus differ at different times and for different groups, and nothing in the regulations or in this record specifies how, if at all, these differences will relate to any objective differences in circumstance. Second, the nature and extent of this new group liability is altogether undefined. This is particularly problematic in light of the vicarious nature of the group liability; for nothing in the regulations or in this record defines the circumstances or extent to which the using group will be responsible for the acts of individuals participating in the authorized group use.

This Court has consistently recognized that the threat of vicarious liability can seriously chill expression and expressive association. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982); *Healy v. James*, 408 U.S. 169, 186-87 (1972); *Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960); *DeJonge v. State of Oregon*, 299 U.S. 353, 365 (1937). For this reason, the First Amendment demands "precision of regulation" where group liability is imposed in an expressive setting. *Claiborne Hardware* at 916; *see also Id.* at 919; *Noto v. United States*, 367 U.S. 290, 299-300 (1961). "In this sensitive field, the [government] may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* at 488. Even if the government has some legitimate interest in imposing a new, non-general, and potentially variable liability on group users of National Forest System lands, the present authorization signature

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[4] *See infra* at 9 n. 8.

[5] This feature also raises insurmountable constitutional difficulties when the challenged permit requirement is evaluated, as it must be, as a prior restraint upon expression. *See infra* at 8 n. 7.

requirement falls far of the constitutionally required "precision of regulation." It cannot be used to impose this sort of liability on those who, like the Petitioners, use the National Forest for expressive association and religious worship.

The Ninth Circuit has recognized the foregoing difficulties in this context, and it has interpreted the challenged authorization signature requirement to minimize them. "As we construe the regulation (and as the government agreed at oral argument), the only group liability provided under the regulation for failure to comply with the permit is revocation and suspension of the permit." *Black v. Arthur*, 201 F.3d 1120, 1123 (9th Cir. 2000). Yet the Third Circuit saw no reason to so limit the challenged regulation in this case. Even after expressly reciting the government's interest in using the authorization signature requirement to impose a group liability, 00-1417 Pet. App. 10a, it entirely ignored the chilling effect engendered by that undefined liability.

For its part, the government, after expressly conceding a saving construction before the Ninth Circuit, sought to avoid a similar result below. Perhaps it recognized that such a concession was inconsistent with the 'hold harmless' and money damage clauses which the Forest Service had included as terms and conditions in the authorization tendered for signature to each of the Petitioners in No. 00-1417. Gov. Ex. 6 at 3 cl. 9, 10; *cf.* 00-1417 Pet. App. 29a-30a. As a result, the terms and conditions enumerated on a written group use authorization can now vary from place to place. In some western states, the authorization signature requirement means one thing while in the Third and Fourth Circuits, *cf. United States v. Johnson*, 159 F.3d 892 (4th Cir. 1998), and in some midwestern states, *United States v. Masel*, 54 F. Supp. 2d 903 (W.D. Wis. 1999); *United States v. McFadden*, 71 F. Supp. 2d 962 (W.D. Mo.

1999), the requirement is less limited and potentially more menacing.[6] Thus while the government argues, Br. Opp. at 19-20, that the decision below is not meaningfully inconsistent with *United States v. Linick*, 195 F.3d 538 (9th Cir. 1999), in light of the regulations adopted on September 9, 1999, 64 Fed. Reg. 48,959, it has totally failed to address the on-going and very troublesome inconsistency with *Black*.

B. The Challenged Regulations Impose an Invalid Prior Restraint Because, in a Number of Subtle Ways, they Leave Forest Service Officials with Impermissibly Broad Substantive and Procedural Discretion in Determining Whether and How to Permit Expression.

Even if the administrative regulations challenged here could survive the constitutional scrutiny which properly applies to mere time, place, and manner restrictions on expression, they would nevertheless fail to pass muster as prior restraints. In its brief in opposition, the United States does not dispute the Petitioners' observation that,

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[6] In light of the fact that several Rainbow Gatherings traditionally occur throughout the country each year, 00-1417 Pet. App. 21a, the present split among the lower courts runs the risk of skewing the location of future gatherings toward the western states, depriving those living in the east and less able to travel of their religious and expressive association. The government's response that Petitioners and others can gather on private land, Br. Opp. at 17, fails to establish that ample alternate avenues of expression are available within the meaning of the constitutional time, place, and manner test. This Court has already rejected the attempt by a government to redirect presumptively protected expression elsewhere by promulgating a time, place, and manner regulation which precludes expressive use of land within its jurisdiction. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76 (1981)(municipality could not rely on other jurisdictions to permit zoning of live entertainment); *Schneider v. State*, 308 U.S. 147, 163 (1939)(handbilling cannot be banned on streets and sidewalks even if not prohibited elsewhere).

where the government seeks to regulate the time, place, and manner of expression by requiring prior permission on a case by case basis, its regulations must pass muster under *both* the time, place, and manner standards *and* the stricter constitutional tests governing prior restraint. *Cf.* 00-1417 Pet. at 20, 22, *citing Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), *and FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990).

The government also largely refrains from addressing the substantive prior restraint challenges which the Petitioners in No. 00-1417 direct against the procedural regulations governing agency processing of applications and administration of authorizations. The government offers no response, for instance, to the Petitioners' observation that the challenged regulations only *appear* to fetter the Forest Service's procedural discretion since they allow licensing officials to undo at any time that which the regulations require them to do promptly in the first place. 00-1417 Pet. at 25-26, *citing* 36 CFR § 251.54(f)(5) [§ 251.54(g)(3)(i)] (requiring very prompt decision on application) *and* 36 CFR §§ 251.54(f)(5) [§ 251.54(g)(3)(i)], 251.60 (a)(1)(i) (permitting subsequent revocation of authorization for any reason which would have supported initial denial). Such provisions merely *hide* administrative discretion; they do not *fetter* it. The Constitution requires that the government do more than play clever games.

The government responds to the Petitioners' prior restraint challenges almost entirely by suggesting that the administrative regulations at issue here do not erect the sort of scheme which is subject to a facial constitutional challenge. From this premise, it concludes that the present Petitioners cannot challenge the procedures governing the application and administration of noncommercial group use authorizations because they never applied for such an authorization in the first place.

In support of this suggestion, the government observes, Br. Opp. at 18, that the permit requirement at issue here is not directed *solely* at expression. In the first place, this argument ignores the fact, already raised by the Petitioners here, 00-1417 Pet. at 3, 11-12, that the final administrative rule-making analysis leaves it unmistakably clear that the government deliberately *designed* this very permit requirement to regulate expressive group uses. *Cf.* 60 Fed. Reg. 45,257-89 (citing First Amendment cases and almost exclusively discussing expressive noncommercial group uses). Beyond this, the government errs in assuming that constitutional prior restraint scrutiny is restricted to legislation which affects expression alone. *Fort Wayne Books, Inc. v. State of Indiana*, 489 U.S. 46 (1989)(invalidating, as unconstitutional prior restraint, use of pretrial attachment of expressive materials in advance of RICO-type forfeiture proceedings even though such attachment of other items is unproblematic). While it is certainly possible to imagine some noncommercial group uses of National Forest System lands which are non-expressive, the courts below had no reason to believe that such uses form a substantial part of what the challenged permit requirement actually regulates. Nor has the government suggested as much here even after these Petitioners specifically raised this issue in their petition for certiorari. 00-1417 Pet. at 12.

Where, as here, it has not been shown that non-expressive activities predominate in a particular licensing category, this Court has long recognized that administrative power to impose permit conditions on a case by case basis[7] provides a constitutionally intolerable opportunity to

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[7] As suggested *supra* at 4 n. 5, the fact that licensing officials can vary a using group's monetary liability on a case by case basis poses a prior restraint problem which is at least as serious as the potential variation of a parade license fee from case to case. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

burden expression because of its content. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988). Such a scheme is the very opposite of legislation, such as a building permit requirement, which provides "too blunt an instrument" to effectively censor speech. *Cf.* Br. Opp. at 18. The Petitioners are fully entitled to challenge this permit requirement on its face.[8]

C. The Challenged Regulations Impose an Invalid Prior Restraint Because they Fail To Provide for the Prompt Judicial Review Which the First Amendment Requires Following the Denial of a License Necessary for Expression.

The government argues that, because the challenged regulations expressly provide that denial or revocation of an authorization is final agency action, *see* 00-1417 Pet. App. at 18a, the permit scheme satisfies the requirement, articulated in *Freedman v. State of Maryland*, 380 U.S. 51, 58-59 (1965), that adverse administrative action be subject to "prompt judicial review." Br. Opp. at 20-21. Yet since the regulations do nothing but permit a disappointed applicant to file a court action, they simply do not respond to the need for a reasonably prompt judicial *determination* of the propriety of a permit denial or revocation. *Cf. National*

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[8] Because the Petitioners are entitled to a facial challenge here, their convictions and sentences in this case cannot be upheld on the basis of a subsequently articulated construction which narrows administrative discretion to within constitutionally permissible limits. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 135-58 (1969). Whether or not the government properly characterizes it as merely "interpretive," the September 9, 1999 regulatory amendment, 64 Fed. Reg. 48,959, cannot influence the constitutional analysis in this case since it came *after* the citations were issued in this case, *see* 00-1417 Pet App. at 36a, and since this case involves a purely retrospective sanction (*i.e.* 3 months' incarceration and fines), as opposed to prospective injunctive or declaratory relief.

Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

The government asserts that the Petitioners did not raise this issue below. Br. Opp. at 20. Yet their appellate brief expressly argued that the "Forest Service regulations are devoid of prompt and meaningful judicial review." C.A. Br. of Beck and Kalb at 25. To be sure, the parties also disputed how quickly a disappointed applicant could get into court, *cf.* 00-1417 Pet. App. at 18a, and the court of appeals entirely rejected the need for any prior restraint protections at all. *Id.* at 15a, 17a. But this does not mean that the Petitioners are not entitled to seek full and proper prior restraint analysis from this Court. This Court has now granted certiorari in *Thomas v. Chicago Park District*, No. 00-1249, in order to determine, *inter alia*, just how a speech-licensing scheme must provide for prompt judicial review. The Petitioners here are entitled to a final judgment in accord with this Court's decision on this matter.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that this Court issue a writ of certiorari in order to review these Petitioners' convictions, fines, and 3-month jail sentences for gathering in a National Forest to speak and pray without prior special use authorization.

Respectfully submitted,

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